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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re FERNANDO. R., a Person Coming Under
the Juvenile Court Law.

F045459

THE PEOPLE,

Plaintiff and Respondent,

(Super. Ct. No. 02-54753)

v.

FERNANDO R.,

Defendant and Appellant.

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Martin Stavin,
Judge.

William J. Capriola, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Mary Jo Graves, Assistant Attorney General, Brian Alvarez and Kelly C.
Fincher, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Fernando R. was adjudged a ward of the juvenile court after he admitted committing the offense of disturbing the peace. (Welf. & Inst. Code, § 602; Pen. Code, § 415.)¹

In the probation officer's report prepared for the disposition hearing, the officer "recommended that due to the nature of the current offense, the Disturbing the Peace, the statements by the co-participant, and the minor's own admission of criminal gang activity, the Court make a finding that the offense of Misdemeanor, 415 PC was gang related and the minor be ordered to register as a gang member."

At the dispositional hearing on April 7, 2004, appellant's counsel objected to the gang registration requirement on constitutional grounds and requested an opportunity to argue the issue to the court. The court committed appellant to the custody of the probation officer for treatment and training, and placed him in the Probation Youth Facility. The court found that the offense was gang related and set a hearing for appellant's constitutional argument.

On April 12, 2004, appellant's counsel argued that the gang registration requirement was unconstitutional. The court disagreed, and again found appellant's offense to be gang related and ordered him to register as a gang member pursuant to section 186.30, subdivision (b) within 10 days of his release from custody.

DISCUSSION

I.

Appellant contends the juvenile court erred by failing to tell him before he pled that he might be required to register as a gang offender (§ 186.30).² Appellant maintains

¹ All statutory references are to the Penal Code unless otherwise noted.

² Section 186.30 provides: "(a) Any person described in subdivision (b) shall register with the chief of police of the city in which he or she resides, or the sheriff of the county if he or she resides in an unincorporated area, within 10 days of release from

that he can show he was prejudiced by the court's omission because the record demonstrates he objected strenuously to the condition and thus it is reasonably probable he would not have made the admission he made if the court had informed him of the registration requirement.

Appellant waived this issue because he did not raise it before the juvenile court at the disposition hearing. (See *People v. McClellan* (1994) 6 Cal.4th 367, 376-377.) At no time during the disposition hearing did appellant complain that he had not been informed of the possible registration requirement before he made the admission or that he would not have made the admission if he had been so informed. Instead, appellant's objection to the registration requirement at the disposition hearing was specifically limited to its alleged unconstitutionality. Although appellant did vigorously argue the constitutional points, he never did assert the claim he now asserts. As a consequence, the juvenile court was not given an opportunity to evaluate whether appellant may have been prejudiced by the court's earlier failure to advise.

In addition, the record does not demonstrate that the registration requirement played any role in appellant's decision to plead. Thus, appellant has not met his burden of establishing actual prejudice. (*People v. McClellan, supra*, 6 Cal.4th at p. 378.)

custody or within 10 days of his or her arrival in any city, county, or city and county to reside there, whichever occurs first.

“(b) Subdivision (a) shall apply to any person convicted in a criminal court or who has had a petition sustained in a juvenile court in this state for any of the following offenses: [¶] (1) Subdivision (a) of Section 186.22. [¶] (2) Any crime where the enhancement specified in subdivision (b) of Section 186.22 is found to be true. [¶] (3) Any crime that the court finds is gang related at the time of sentencing or disposition.”

II.

Appellant contends the evidence was insufficient to support the court's finding that the admitted offense was "gang related" within the meaning of section 186.30, subdivision (b)(3). Specifically, he claims the record does not prove that one of the organization's primary activities was the commission of any crime enumerated in section 186.22, subdivision (e)(1) through (25).

Whether appellant's offense was gang related is subject to proof by a preponderance of the evidence. (*In re Jorge G* (2004) 117 Cal.App.4th 931, 944.) Thus, the court's finding that the instant offense was gang related will be supported by sufficient evidence only if the court reasonably could have found, based on a preponderance of evidence that is reasonable, credible, and of solid value, "each element of gang-relatedness." (*Ibid.*) A crime is gang related if it pertains to a criminal street gang as defined in section 186.22, subdivisions (e) and (f). (*Ibid.*) "The elements of this definition require: (1) an ongoing organization or group, (2) of three or more persons, (3) having as one of its primary activities the commission of the crimes enumerated in section 186.22, subdivision (e)(1)-(25), (4) having a common name or symbol, and (5) whose members individually or collectively have engaged in a pattern of criminal gang activity." (*Ibid.*)

"To support element (3), there must be substantial evidence that the commission of offenses enumerated in section 186.22, subdivision (e), is a primary activity of the gang. 'Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the group's primary activities.' [Citation.] However, evidence sufficient to show only *one* offense is not enough.

"The phrase "primary activities," as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's "chief" or "principal" occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members.... [¶] Sufficient proof of the gang's

primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute.' [Citation.] [¶] We recognize that a gang's primary activities may be shown through expert testimony [citations]" (*In re Jorge G.*, *supra*, 117 Cal.App.4th at pp. 944-945.)

Here, appellant admitted he was a member of a gang and admitted he committed the subject offense for gang-related reasons. But, there was no evidence whatsoever before the trial court that tended to prove that the gang to which appellant claimed adherence was in fact a group that, as one of its primary activities, committed any of the crimes enumerated in section 186.22, subdivision (e)(1) through (25). Appellant's admission that he was a gang member went only part of the way to the necessary proof. However appellant may have characterized the group with which he associated, it could not be found to be a gang within the meaning of section 186.30 unless and until the People proved that the particular group was of the type described in section 186.22, which the People did not. We will therefore reverse the finding and the associated order to register.

The People may present evidence on the topic on remand. As we said in *Jorge G.*, "[a]lthough we reverse the order to register, we conclude the People are entitled to present sufficient evidence in light of the definition and standard of proof that we set forth [in the opinion]. [¶] In doing so, we conclude that a second disposition hearing will not violate the prohibition on double jeopardy.... [¶] Nor would the imposition of registration upon remand, if the court makes the requisite findings based on sufficient evidence, be prevented by the doctrines of res judicata, collateral estoppel, or law of the case." (*In re Jorge G.*, *supra*, 117 Cal.App.4th at pp. 946-947.)³

³ All other issues raised by appellant, including his several challenges to the constitutionality of the gang registration statute and order, are moot.

DISPOSITION

The judgment (order) appealed from is reversed. On remand, the juvenile court shall conduct a new dispositional hearing and, in doing so, determine whether appellant's offense was gang related based upon the evidence presented at that hearing and, at the conclusion of the hearing, enter an appropriate new dispositional order.

Dibiaso, Acting P.J.

WE CONCUR:

Levy, J.

Gomes, J.